

---

---

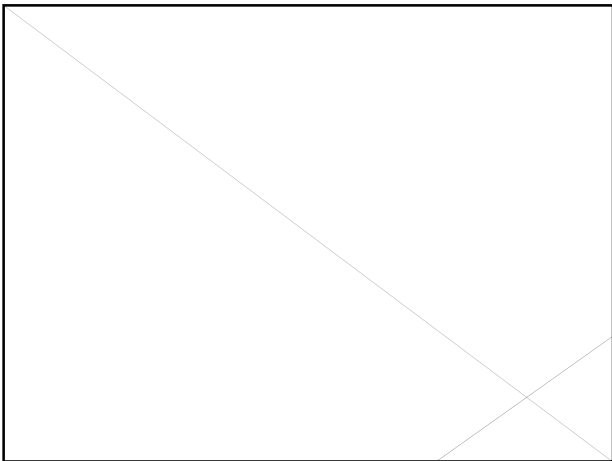
---

---

---

---

---



---

---

---

---

---

---

---



---

---

---

---

---

---

---




---

---

---

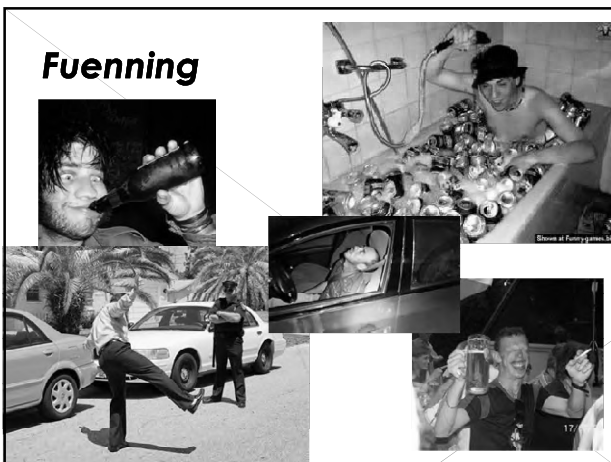
---

---

---

---

---




---

---

---

---

---

---

---

---

### Typical *Fuenning* Situation

- Witness says defendant was drunk, or seemed impaired, or merely mentions the word drunk
- Defense asks for a mistrial based on *Fuenning* claiming this goes to the ultimate issue.

---

---

---

---

---

---

---

---

## Testimony

- Q: Are you familiar with the symptoms of intoxication?
- A: Yes
- Q: Did the defendant display them?
- A: Yes. The defendant's conduct seemed influenced by alcohol.

*Fuenning v. Superior Court*, 139 Ariz. 590, 605 (1983).

---

---

---

---

---

---

---

## What did *Fuenning* say?

- When in a DWI prosecution, the officer is asked whether the defendant was driving while intoxicated, the witness is actually being asked his opinion of whether the defendant was guilty.
- In our view, such questions are not in the spirit of the rules . . . Ordinarily, more prejudice than benefit is to be expected from this type of questioning.

---

---

---

---

---

---

---

## Keep Highlighted Relevant Case Law in Your Trial Notebook

- Officer testified the defendant was "under the influence"
- Not per se inadmissible or reversible error
- *Fuenning*'s ultimate opinion testimony was *dicta*
- It did not overrule existing law holding such evidence admissible
- *Fuenning* requires trial court to consider whether the probative value outweighs its prejudicial impact

*State v. Bojorquez*, 145 Ariz. 501 (1985)

---

---

---

---

---

---

---

**State v. Askren, 147 Ariz. 436  
(App.1985)**

Q: Is there something you hope to learn from the whole battery (of FSTs) . . . ?

A: Yes, on the basis of his performance on the test and my observations of his physical appearance and the odor of his breath, it's an attempt to determine whether he is, in fact, intoxicated and was intoxicated while he was driving the car.

See also, *State v. Bedoni*, 161 Ariz. 480 (App. 1989)

---

---

---

---

---

---

---



---

---

---

---

---

---

---

**Violations Rarely (if ever)  
Require new trial**

- On a scale of 1 to 10 the defendant rated a "ten plus" for intoxication is an expression of opinion on the ultimate issue
- But was not prejudicial and did not require reversal based on other evidence (not stricken here)

*State v. Lummus*, 190 Ariz. 569 (App. 1998).

---

---

---

---

---

---

---

***State v. White*, 155 Ariz. 452  
(App. 1987)**

- Cited *Bojorquez* with approval.
- Testimony was that officer had the impression defendant was definitely under the influence.

---

---

---

---

---

---

---

***State v. White*, 155 Ariz. 452  
(App. 1987)**

- We agree with defendant's argument that the officer's statements were impermissible. *Fuenning*
- However, *Fuenning* also said that it would be proper to ask whether defendant displayed symptoms of intoxication or whether defendant's conduct seemed influenced by alcohol. *Id.* We must determine whether the officers' statements were prejudicial.

---

---

---

---

---

---

---

***State v. White*, 155 Ariz. 452  
(App. 1987)**

- Here, no officer was asked whether defendant was driving while intoxicated.
- As to Lair's testimony, the question was about symptoms, and the nonresponsive answer was that the defendant was "under the influence."
- Upheld trial judge who sustained the objection without granting a motion for mistrial.

---

---

---

---

---

---

---

Searched but did not find  
**ANY** case that ordered a new  
trial on appeal for a so-called  
*Fuenning* error.

---

---

---

---

---

---

---

### Civilian Witnesses

Lay witnesses that have observed a  
person at a time in question may give  
their opinions of intoxication or sobriety.

*Esquivel v. Nancarrow*, 104 Ariz. 209 (1969); *State ex  
rel Hamilton v. City Court of Mesa* (Lopresti, RPI) 165  
Ariz. 514, 518, n.3 (1990); *M. Udall*, *Arizona Law of  
Evidence* § 22 at 39 (1960); *Morales v. Bencic*  
12 Ariz.App. 40 (App. 1970).

---

---

---

---

---

---

---

VGN

---

---

---

---

---

---

---

## VGN - Typical Situation

- Prosecutor asks officer what he did next  
– officer testifies to VGN test
- Defense asks for a mistrial claiming VGN testimony is not admissible

---

---

---

---

---

---

---

## VGN

- What is the specific objection?
- Challenge the defense for a legal basis
- No AZ case says does not meet Rule 702 or is not admissible

---

---

---

---

---

---

---

## VGN

- HGN Manuals – not in original research but field use has proven VGN reliable indicator of high dose Etoh & DID drugs for that individual
- Studies - Citek 2003 & 2011
- Use officer's experience

---

---

---

---

---

---

---

- In situations where consent is obtained, there is no need for compliance with the implied consent statute. *State v. Groshong*, 175 Ariz. 67, 852 P.2d 1251 (App. 1993).

---

---

---

---

---

---

---

- In situations where consent is obtained, there is no need for compliance with the implied consent statute. *State v. Groshong*, 175 Ariz. 67, 852 P.2d 1251 (App. 1993).
- In *State v. Brita*, 1 CA-CR 9670 (Ariz.App., Feb. 5, 1987) (review granted, Arizona Supreme Court, May 13, 1987) we considered the application of this statute where no violation of constitutional rights was involved in obtaining the evidence, but an Arizona statutory violation was alleged. We held that under these circumstances, **A.R.S. § 13-3925(A)** was intended to apply and the evidence "should not be kept from the trier of fact where it was obtained in good faith."

---

---

---

---

---

---

---

- 745 P.2d 172, 155 Ariz. 114, *State v. Nahee*, (Ariz.App. 1987)
- The Courts cannot without precedent create exclusionary rules where the prejudice stemming from alleged unlawful conduct is not self evident. *Boag v. State of Arizona*, 21 Ariz. App. 404, 520 P.2d 317 (1974). Here, no remedy is provided for in the statute. The exclusionary rule originally applied only in federal prosecutions for Fourth Amendment violations but has been expanded to apply to the States through the Fourteenth Amendment to Fifth and Sixth Amendment violations. The purpose of the exclusionary rule is to discourage unconstitutional acts by law enforcement officials. It is not absolute see *State of Arizona v. Atwood*, 171 Ariz. 576, 832 P.2 593 (1992).
- 

---

---

---

---

---

---

---

165 ARIZ. 154

### Appeals

STATE v. COATS,  
Feb. 15, 1990.

- The exclusionary rule is, in essence, judge-made law designed to vindicate the constitutional right to privacy as embodied in the Fourth and Fifth amendments to the Constitution of the United States and in article 2 sections 8 and 10 of the Arizona Constitution. It gives substance to those rights so that they do not merely become a "form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 321 (1920). It also serves "the imperative of judicial integrity"—that is—it is a recognition that the judiciary ought not be involved in ex \*697 \*158 plotting violations of the basic law. *Elkins v. United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669, 1680 (1960). Although it has been referred to as a rule of evidence, *Smith Steel Casting Co. v. Donovan*, 725 F.2d 1032 (5th Cir.1984), it is not. *Mapp v. Ohio*, 367 U.S. 643, 649, 81 S.Ct. 1684, 1688, 6 L.Ed.2d 1081, 1086 (1961).
- 3 The fact is that the exclusionary rule, as a pronouncement of what the federal and state constitutions require, seems to be in a category by itself. We need not decide to just what species it belongs because the Supreme Court of Arizona has repeatedly said that it will recognize a statutory rule which invades the court's prerogative if the statute is "reasonable and workable" in relation to court promulgated rules. *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984). See also *State v. Superior Court*,

---

---

---

---

---

---

---

---

- Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515.

---

---

---

---

---

---

---

---

- B. After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve months, or for two years for a second or subsequent refusal within a period of eighty-four months, unless the violator expressly agrees to submit to and successfully completes the test or tests. A failure to expressly agree to the test or successfully complete the test is deemed a refusal.

---

---

---

---

---

---

---

---

- D. If a person under arrest refuses to submit to the test designated by the law enforcement agency as provided in subsection A of this section:
- 1. The test shall not be given, except as provided in section 28-1388, subsection E or pursuant to a search warrant.

---

---

---

---

---

---

---

---

## Review, Object To & Modify Proposed Defense Instructions

- Change "threat to public" back to "danger to himself or others"




---

---

---

---

---

---

---

---

- Though discussing a different issue, *Campoy* also recognizes that any lack of perfection in the tests used goes to the weight, not the admissibility. As does the acknowledged fact that several factors other than alcohol impairment can lead to a cue of impairment on an FST. Here is the language from *Campoy*:
- "The respondent judge ordered the restrictions based on his finding there is no scientific correlation between impairment and performance on FSTs, a finding in turn based on expert testimony that several factors other than alcohol impairment can lead to a cue of impairment on an FST. Our supreme court has indicated, however, that expert testimony goes to the weight to be given to FST evidence, not its admissibility or relevance at trial. See *State v. Velasco*, 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990) ("Any lack of perfection [in tests used to measure BAC] affects the weight the jury may wish to accord the evidence obtained by [those] test[s], not its admissibility."). Furthermore, although we generally defer to a respondent judge's factual findings, the respondent's conclusion here is not supported by the evidence. See *Motel & Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 562, 569, 991 P.2d 272, 274 (App.1999). The mere self-evident fact that circumstances other than alcohol impairment can be responsible for cues of impairment on FSTs does not establish that such tests are necessarily uncorrelated with impairment. . . ."
- \* \* \*
- "Thus, the proper method for challenging FST deficiencies is testimony, such as that of Cordova's expert at the pretrial hearing, calling these deficiencies to the attention of the jury and presenting evidence that cues of impairment were caused by something

---

---

---

---

---

---

---

---

- "[I]t is clear Arizona law permits testimony about a defendant's performance on FSTs as long as no correlation is made between performance and BAC and no scientific validity is assigned to the tests themselves as accurate measures of BAC. FST performance has repeatedly been found to be relevant evidence of a defendant's impairment; thus, we disagree with the respondent's implicit conclusion to the contrary. See *Blake*, 149 Ariz. at 280, 718 P.2d at 182 (FST performance admissible "as evidence that the driver is 'under the influence'"); *Hamilton*, 165 Ariz. at 518 n.3, 799 P.2d at 859 n.3 ("Field sobriety tests ... show[ ] clues or symptoms that correlate to impairment."); *Fuenning*, 139 Ariz. at 599, 680 P.2d at 130 (performance on FSTs not conclusive, but relevant to question of intoxication); *Askren*, 147 Ariz. at 437, 710 P.2d at 1092 (purpose of FSTs is to determine alcohol intoxication).
- Though discussing a different issue, *Campoy* also recognizes that any lack of perfection in the tests used goes to the weight, not the admissibility. As does the acknowledged fact that several factors other than alcohol impairment can lead to a cue of impairment on an FST. Here is the language from *Campoy*:

---

---

---

---

---

---

---

---

## Common Issues




---

---

---

---

---

---

---

---




---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

Warn the court regressing –  
if basing instructions on  
language from Ct. of  
Appeals Opinions.



---

---

---

---

---

---

---